No. 87-107

In The
Supreme Court of the United States
October Term, 1987

BRENDA PATTERSON,
Petitioner,

vs.

McLEAN CREDIT UNION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether a separate claim for racial harassment is cognizable or must be submitted to the jury under 42 U.S.C. § 1981, independent of a parallel Title VII or § 1981 claim for discriminatory promotion and discharge?

2. Whether the Plaintiff in a claim under 42 U.S.C. § 1981 has the burden of proof of showing that she was better qualified than another employee who was promoted, after the employer has offered evidence that superior qualifications were the basis of such promotion and the claimant has shown no "other unlawful criteria?"

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Petitioner's Brief has inaccurately represented the facts and omitted pertinent matters to such a degree that the Respondent is compelled to address the Statement of the Case prior to presenting its argument.

The Respondent, McLean Credit Union, is a financial institution chartered by the State of North Carolina making loans and accepting deposits solely from a defined field of members. At all times relevant to this cause of action, the field of membership for McLean Credit Union was limited to the employees of McLean Trucking Company. However, other than this relationship, McLean Credit Union and McLean Trucking Company were separate corporate entities and McLean Trucking Company had no direct responsibilities with regard to the operation or policies of the Credit Union. TR[1] 3-79 to 3-80.

[1]Consistent with Petitioner's Brief, references are to the Transcript of Trial, November 12, 13, 14, 15, 18, 1985.

The Petitioner, Brenda Patterson, was employed by the Respondent, McLean Credit Union, in 1972 as a "File Co-Ordinator." TR 1-20; TR 1-99. As the result of a decline in business in 1981 and 1982, the Petitioner and two other general clerical employees (both white) were laid off. TR 3-82 to 3-93. Notwithstanding Petitioner's contentions to the contrary, seniority was neither the company policy nor a criteria used in determining these layoffs and no competent evidence was tendered showing otherwise. TR 3-96. In accordance with the layoff procedure adopted, the Respondent terminated these employees, including Petitioner, after six months without recall. TR 3-91 to 3-92.

Susan Williamson, a white, was hired by the Respondent in 1974 as an "Accounting Clerk". TR 3-105. Mrs. Williamson had completed two years of college and was a Dean's List student. She had completed courses in college in Accounting I and II, Economics I and II, College Math, Calculus I, II and III and Business Finance and expressed an aptitude and enjoyment in working with figures. Def. Ex. 6, TR 2-33, 4-106.

Brenda Patterson admittedly was hired as a File Co-ordinator or filing clerk. However, because McLean Trucking Company performed the payroll functions for the Credit Union as an accommodation to Respondent, Mrs. Patterson's job classification was listed as "Accounting Clerk" on her original rating classification card in order to be consistently reflected under the McLean Trucking Company job classifications. TR 3-82, 3-105 to 3-107; (Pl. Ex. 3, TR 1-60, 1-65). Between 1972 and 1982 the maximum number of general office hourly employees (such as Petitioner and Williamson) employed by the Respondent was nine, including at all times the Petitioner. TR 3-82 to 3-83.

Petitioner contends in her brief that she told Respondent's President, Stevenson that she was interested in bookkeeping or secretarial jobs.[1] However, the record clearly shows that this statement was made to Mr. Stev

[1]Brief for Petitioner at pp. 9-10.

at McLean Trucking Company, a separate corporate entity in a prior separate interview. TR 1-22 to 1-23; 3-80. There is no evidence that any such request was made to Mr. Stevenson or to any of Petitioner's supervisors at the Credit Union. To the contrary, Petitioner admits that during her employment, she never asked or made any inquiry for any promotion to or training for an accounting position or any other position. TR 2-61 to 2-62. During Williamson's employment at McLean, she worked solely in the accounting area, TR 2-33, except for a brief transfer to data processing from October 1, 1979 to February 18, 1980. TR 2-159 to 2-160.

In 1982, in recognition of her satisfactory job performance[2], Williamson received a title change from "Account *Junior*" to "Account Intermediate." However, there were no changes in Williamson's job responsibilities, functions or supervisor subsequent to this change. Contrary to Petitioner's contentions, there was no job vacancy before or after Williamson's title change. The Respondent hired no other employees after Williamson's title change. Williamson received a pay increase but continued her same duties. TR 4-26 to 4-28.

Contrary to her contentions, Petitioner was not qualified for nor did she have the experience, aptitude or qualifications to perform the accounting job. Evidence further showed that Williamson was more qualified than Petitioner to do each job function required for the accounting position. TR 4-28 to 4-32. Additionally, each year from 1980 through 1982, Williamson's annual evaluations exceeded Petitioner's. TR 4-33 to 4-35; (Pl.Ex. 5, TR 1-62, 1-65; Def.Ex. 4, TR 2-30, 4-106; Def.Ex. 8, TR 2-105, 4-106;

[2]Petitioner puts great emphasis on the alleged testimony of Warren Bebling that Williamson did not grasp accounting functions (Brief for Petitioner at pp. 11-12). In fact, Bebling testified that what Mrs. Williamson did not grasp was data processing and computer programming TR 2-190 to 2-191. Further, the significance of Bebling's testimony is irrelevant or severely limited because of his termination from the company for poor job performance and employer relationships prior to the onset of the period of limitations applicable to this case. TR 3-114 to 3-115.

Def.Ex. 16, TR 4-31, 4-106; Def.Ex. 17, TR 4-31, 4-106; Def.Ex. 20, 4-31, 4-106).

Further, Petitioner's application test showed that Petitioner attempted to answer only four of the fifteen mathematics questions. Of the four questions attempted, only one was answered correctly. TR 4-95 to 4-97; (Def.Ex. 21, TR 4-93, 4-106).

Finally, when the Petitioner worked part-time as a teller, she indicated to the President of the Credit Union that such work was too much pressure. There was evidence that Petitioner was poor at "balancing" and made numerous errors. Petitioner indicated that she did not want to do teller work. TR 3-103 to 3-104.

Petitioner alleges that she was discriminated against because she was not considered for the job of Account Intermediate which was the "promotion" received by Williamson. TR 1-46 to 1-48. However, the accounting positions required more numerical aptitude and bookkeeping skills than the teller position which Petitioner could not adequately perform. TR 4-37 to 4-38.

Petitioner's assertions that "throughout the time she worked at McLean Credit Union, [she] was subjected to abusive and demeaning terms and conditions of employment" and that she was "constantly scrutinized and criticized"[4] are simply not supported by the record. The record reflects only two incidents of alleged racial remarks made to Patterson during her ten year employment. At the time of Petitioner's initial interview in 1972, Respondent's President allegedly informed her that she would be working only with white women.[5] TR 3-96 to 3-97. The only

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[4]Brief for Petitioners at pp. 5-6.

[5]Although this alleged instance occurred in 1972 at an previous time for many businesses as they integrated their work force and is far outside the applicable three year statute of limitations, the District Court allowed the testimony as background and to support the element of "intent" required in a Section 1981 case. Mr. Stevenson denied this comment, but admitted talking with the employees about hiring a minority for the first time. "I . . . I wanted them to be comfortable with it and I wanted the

(Continued on following page)

other statement which Petitioner testified was a racial remark was a statement allegedly attributed to Respondent's President in 1976 that—"blacks were slower than whites by nature." TR 1-88. Respondent's President denied the remark. TR 3-109. Although Petitioner complains that she received personal criticism during staff meetings, the record is clear that such criticisms were business related, were made without personal comment and reflected errors which she admittedly had made prior to the date of the meeting. Tr 1-89; TR 2-72 to 2-78. She further admits that whites were also criticized at staff meetings. TR 2-72. Further, she could not recall the time periods such criticisms occurred and whether they were within the period of limitations. TR 2-73 to 2-76.

Although throughout the trial of this matter Petitioner consistently complained of an inordinate amount of work being placed upon her and that she allegedly did the work of three people, TR 1-25, the evidence is clear that she was placed on probation and was continually counselled and assisted because of slow work.[6] TR 2-91; 3-111 to 3-114;

(Continued from previous page)

minority to be comfortable with it . . . I wanted to make sure that these people, the white people as well as the black person was comfortable in working in that environment." TR 3-123, 3-124.

[6]Likewise, this alleged comment was outside the period of limitations.

[6]Exhibits introduced at Trial were indicative of Petitioner's history of slow work and poor job performance. In 1977 she was placed on probation for "slow work and poor job performance." (Def.Ex.6, TR 2-102, 4-106) Her 1979 performance evaluation noted "Brenda's speed of work is somewhat slow . . . Brenda's teller activity produces too many errors . . . [Brenda] does not possess the knowledge to work in other areas of the office . . . Brenda's performance is less than . . . hope[d] [for]." (Def.Ex.5, TR 2-29, 4-106) The 1978 evaluation commented "Brenda's work speed is slow . . . Brenda's work is slower than desired . . . Her work on the teller line is not satisfactory as she continues to make teller errors in balancing . . ." (Def.Ex.7, TR 2-102, 4-106) The 1981 evaluation and the 1982 evaluation, both by a different supervisor than the 1978 and 1979 evaluations also noted that she could increase her speed. (Def.Ex.5, TR 2-30, 4-106; Def.Ex.16, TR 4-31, 4-106)

and that subsequent to her termination, the job functions which she had been previously performing were absorbed by other members of the staff without the necessity of hiring additional personnel. TR 4-45.

Petitioner further contends that she was racially harassed because Respondent's President "stared" at her. TR 1-38 to 1-39. Mr. Stevenson contends that he necessarily observed the employees at their work. TR 3-109 to 3-110. Petitioner concedes that this observation was from as much as forty feet away, TR 2-86; and that to observe her work in the vault, it was necessary to stand at or near the vault door. TR 1-101.

There was no formal training avilable to any clerical employee and no employee including Williamson received any job training that was not available to all employees.[8] In fact, Petitioner received additional help and training. TR 2-33; TR 2-38; TR 3-111.

Petitioner misleads the Court by asserting that she was "never able to find out about promotion opportunities until after the decisions had been made" and that "several white workers with less education, less seniority and less experience than Patterson were hired or promoted" while she was not.[9] In fact Petitioner offered evidence at trial of only one "promotion" for which she contended she was the object of racial discrimination—that of Williamson to the position of Account Intermediate. TR 1-46 to 1-47. Petitioner's contention that white workers with less education, less seniority and less experience than she had were hired or promoted to secretarial or bookkeeping positions while she was not, is not only a misstatement of the evi-

[8]The only evidence offered by the Petitioner of discriminatory training opportunities was her own direct testimony consisting of a single unsubstantiated allegation that Williamson "was given special training for this position." TR 1-49. Petitioner offered no evidence describing what this "special training" consisted of. In contradiction, the Respondent showed that Williamson did not receive any special training. TR 4-110 to 4-112 and that the employer had no formal training programs. TR 4-38.

[9]Brief for Petitioner at p.10.

dence, but such allegations concern matters clearly outside the statute of limitations. Further, Petitioner offered no evidence that either education or seniority were criteria used by Respondent in making promotions.[10]

Finally, Petitioner is incorrect in her allegation that she was denied a "merit" increase in salary that was given to white employees.[11] To the contrary, other black employees were given a "merit" increase in 1982 while "merit" increases were denied to other white employees. Merit raises were given on the basis of performance and were not automatic raises. TR 3-108.

Likewise, Petitioner's contentions that "when secretarial or bookkeeping positions opened, white workers were hired or promoted into the positions, while the black workers remained in the file room,"[12] is a gross misstatement of the testimony. The uncontradicted evidence was that no blacks ever applied for a secretarial position. TR 4-11 to 4-12. Further, Patterson testified that she requested to move her desk from behind the teller line to the vault where the filing took place. TR 1-100 to 1-101. Lastly, Carrie Worsley, a black, who was at all times employed as a teller, worked on the teller line and not in the vault or file room. TR 1-42.

Following her termination, the Petitioner pursued and exhausted her administrative remedies under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982) and received on June 30, 1983 a "Notice of Right to Sue." JA p.18. The Petitioner chose not to file an action under Title VII for racial harrassment or disparate treatment and instead filed this action under 42 U.S.C. § 1981 on January 25, 1984. JA pp. 5-16.

[10]Nevertheless, greater education and seniority do not outweigh more direct experience. Young v. Lehman, 748 F.2d 194, 198 (4th Cir. 1984), cert. denied, 471 U.S. 1061 (1985).

[11]Brief for Petitioner at p.12.

[12]Brief for Petitioner at p.9.

SUMMARY OF ARGUMENT

I. A separate discrete claim for racial harrassment is not cognizable under § 1981. Title 42 U.S.C. § 1981 provides, in pertinent part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens * * * ." It is well established that § 1981 may provide a cause of action parallel to Title VII, 42 U.S.C. § 2000(e) in cases of racial discriminatory practices in hiring, firing and promotion. The Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000(e), et seq. makes employment practices unlawful that "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." It has further been established that the remedies under § 1981 and Title VII are separate and distinct. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

In addition to actions for discrimination in hiring, firing or promotions, Title VII also makes actionable a racially discriminatory work environment. *Rogers v. Equal Employment Opportunity Comm'n.*, 454 F.2d 234 (5th Cir. 1971) *cert. denied*, 406 U.S. 957 (1972). However, a separate discrete cause of action for racial harassment is not cognizable under Section 1981.

The legislative history and plain and ordinary construction of the language of § 1981 support the contention that a separate discrete claim for relief for racial discrimination will not stand when isolated from a claim for racially discriminatory hiring, firing or promotion.

Section 1981 prohibits discrimination in the "making and enforcing of contracts." Beginning with the decision of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) this Court has consistently interpreted the legislative history of § 1981 as granting the "competence and capacity" to contract. Further, the cases in this Court addressing the legislative history and interpretation of § 1981 have consistently interpreted the statute as one affecting economic rights. *See, e.g., Runyon v. McCrary*, 427 U.S. 160 (1976); *Goodman v. Lukens Steel Co.*, 482 U.S. —; 107 S.Ct. 2617 (1987); *see also, Tillman v. Wheaton-Haven Rec. Ass'n.*, 410 U.S. 431 (1973) (construing the economic impact of the parallel provisions of 42 U.S.C. § 1982.)

Racial harassment in the work place that does not impact on hiring, discharge or promotion decisions has no effect on the economic rights of a minority employee and does not affect such an employee's basic fundamental rights to "make and enforce contracts."

Although this Court has not yet addressed the issue of whether a separate independent claim of racial harassment is cognizable under § 1981, several other lower federal courts in addition to the Fourth Circuit have determined that such a claim is not cognizable. *See, e.g., Williams v. Atchison, Topeka and Santa Fe Ry.*, 627 F. Supp. 732 (W.D.Mo. 1986); *Minority Police Officers Ass'n. of South Bend v. City of South Bend, Indiana*, 617 F.Supp. 1330 (M.D.Ind. 1985); *Howard v. Lockheed-Georgia Co.*, 372 F.Supp. 854 (N.D.Ga. 1974).

The basic fundamental rights granted to all persons, the same as white citizens, are the rights to enter into a contract and hold the other party to it and the right to enforce such contracts in court. Neither in 1866 nor in 1870 did "white citizens" have the right to bring an action strictly for harassment. It was not the intent of the Thirty-ninth Congress to grant such a substantive tort claim for relief. Other laws may grant remedies for harassment, such as Title VII, breach of contract actions, malicious interference with contracts, intentional infliction of emotional distress or other actions and § 1981 grants access to the courts and the rights of all persons to maintain such independent causes of action. However, § 1981 establishes no separate cause of action for racial harassment.

Although there is some confusion in the courts as to a differentiation of the various rights and remedies available under Title VII and § 1981, such decisions generally

have not supported an independent claim for racial harassment or hostile working environment separate and apart from claims under Title VII or collateral claims of racially discriminatory promotion and discharge practices. It is not disputed that the statutes have many similarities and that the proof scheme established in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973) is applicable to both statutes. Further, it is well established that intentional racial discrimination is necessary to support a claim under § 1981. *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982). However, even under Title VII "not all work place conduct that may be described as 'harassment' affects a 'term, condition or privilege' of employment . . . ." *Meritor Savings Bank v. Vinson*, No. 84-1979 (U.S. June 19, 1986), slip op. 9. In many cases, the courts have found that the alleged racial practices were not so opprobrious or working conditions so intolerable as to enforce a constructive discharge claim or trigger a claim under Title VII. *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981); *Martin v. Citibank, N.A.*, 762 F.2d 212 (7th Cir. 1985); *Muller v. United States Steel Corp.*, 509 F.2d 923 (10th Cir.) *cert. denied*, 423 U.S. 925 (1975). If such alleged adverse and hostile working conditions were not so opprobrious as to force the resignation of the Petitioner or support a claim of constructive discharge, then it is illogical to assume that such actions could stand alone under Title VII, much less § 1981.

Ultimately, the facts of this case fall far short of the *prima facie* showing necessary to support a claim of racial harassment. Assuming *arguendo* that such a claim is cognizable under § 1981, it is reasonable to assume that the *McDonnell-Douglas* proof scheme is also applicable to such claims. First of all, the applicable North Carolina three year statute of limitations bars any allegations or claims prior to January 25, 1981. The remaining allegations by the Petitioner (which are unsubstantiated as to date) are that the Respondent's President stared at her,

gave her an inordinate amount of work, criticized her at staff meetings and requested that she dust and sweep. Even taking all of the Petitioner's allegations as factually correct and undisputed, they still fall far short of conditions "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *See Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). After Respondent's evidence offering non-discriminatory explanations in response to such allegations, Petitioner offered no rebuttal to show pretext. Petitioner's allegations are insufficient to support a claim of racial harassment even under Title VII.

II. Likewise, Petitioner's evidence with regard to her allegation of promotion discrimination was insufficient to support a *prima facie* case. To establish such a *prima facie* case, the Petitioner must meet the elements required by *McDonnell-Douglas v. Green*, 411 U.S. 792, 802 (1973).

The evidence regarding the promotion incident was that Susan Williamson had been working for 7½ of the prior 8 years as an Account Junior and because of her satisfactory job performance, she received an upgrade in title and pay. Mrs. Williamson received no additional or different job responsibilities. No job vacancy was open, filled or created by the so-called promotion. Mrs. Williamson had completed college courses in calculus, accounting and business finance. The Petitioner who was at all times employed as a filing clerk had experienced difficulty in balancing her books when she worked as a part time teller, disliked the pressure of working as a teller, had no experience in the accounting functions, had received numerous evaluation notes for slow work and lacked the necessary education, skills or aptitude to perform the accounting position. However, the Petitioner claims that she was entitled to the position of Account Intermediate and that the Respondent unlawfully discriminated against

her by advancing Mrs. Williamson rather than providing this position to the Petitioner. The only reasonable inference which any reasonable person could draw from these facts is that there was no "promotion" for which there was a vacancy and that Petitioner produced no evidence that she was qualified to perform the accountant functions. However, the Court allowed the claim to go to the jury, obviously with the opportunity in the event of a verdict adverse to the Respondent, to reconsider Petitioner's *prima facie* case at Respondent's Motion for a judgment notwithstanding the verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure.

Once the court had determined to allow the issue of promotion discrimination to be resolved by the jury, the Respondent was compelled under a strict application of the *McDonnell-Douglas* proof scheme to offer a non-discriminatory reason for its decision. Within the context of established case law, the simple explanation for the "decision" was Mrs. Williamson's superior qualifications. Once this evidence was proffered, the burden was on the Petitioner to show pretext or that Respondent's explanation was unworthy of credence. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). Petitioner contends that such pretext could have been shown not only by showing superior qualifications but (1) by showing equal qualifications; (2) by showing that the employer did not rely on qualifications; or, (3) by showing that the employer's explanation was not credible. Because Petitioner offered no rebuttal evidence and the record was void of any evidence that Petitioner's qualifications were equal to Mrs. Williamson's or that the employer did not rely on qualifications in making its decision or that the reason given by the employer was not credible, the court correctly charged the jury in accordance with established precedents that the Petitioner must show her superior qualifications. *Young v. Lehman*, 748 F.2d 194

(4th Cir. 1984); *Anderson v. City of Bessemer*, 717 F.2d 149 (4th Cir. 1983), *rev'd on other grounds*, 470 U.S. 564 (1985); *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633 (4th Cir. 1983) *rev'd on other grounds sub nom; Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984). "The employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). Therefore, where there is no evidence of an unlawful criteria and Respondent has prefferred a non-discriminatory reason for its decision, it is encumbent upon the Petitioner to show her superior qualifications.

ARGUMENT

I.

THE PETITIONER WAS NOT ENTITLED TO THE SUBMISSION OF A SEPARATE ISSUE OF RACIAL HARASSMENT UNDER § 1981

A. A Separate Discrete Claim for Racial Harassment Is Not Cognizable Under § 1981

The issue to be determined in this matter is whether racial harassment is cognizable under 42 U.S.C. § 1981 (1982) separate and apart from an actionable claim of racially discriminatory hiring, firing, or promotion. The statute, 42 U.S.C. § 1981, provides:

> All persons within the jurisdiction of the United States shall have the same right in every state and territory *to make and enforce contracts*, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

(emphasis added).

Obviously racial harassment may be relevant as evidence of discriminatory intent supporting a cognizable claim of employment discrimination under § 1981, and may give rise to a discreet claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e). See, e.g., *EEOC v. Murphy Motor Freight*, 488 F.Supp. 381, 384-86 (D. Minn. 1980); and, *United States v. Buffalo*, 457 F.Supp. 612, 631 (W.D.N.Y. 1978), *modified on other grounds*, 633 F.2d 643 (2d Cir. 1980). However, the pertinent language of Title VII which makes unlawful "discriminat[ion] against any individual with respect to his *compensation, terms, conditions or privileges of employment* because of such individual's race," 42 U.S.C. § 2000(e)(a)(1982)(emphasis added) is in sharp contrast to § 1981's prohibition of discrimination in *making and enforcing contracts*. Although a cause of action for racial harassment is cognizable under Title VII and the Petitioner in this action requested and received a Notice of Right to Sue from the EEOC, she elected to file her action solely under § 1981.[13]

Various courts have undertaken to define racial harassment. In a Title VII case, the Fifth Circuit held that Title VII was "aimed at the eradication of such noxious practices . . . [as] . . . working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority [ ] workers." *Rogers v. Equal Employment Opportunity Comm'n.*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). The court went on to say that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" does not necessarily fall within Title VII *id.* at 238. Another court recognized that derogatory remarks would constitute a Title VII violation "upon attaining an excessive or opprobrious level," or that "a malicious or inordinate racial slur usage would result in defendant's liability." *Vaupke v. Pool Offshore Co., Etc.*, 683 F.2d 922, 925 (5th Cir. 1982). Likewise, the Court in *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977) "recognized that derogatory comments *could be* so excessive and opprobrious as to constitute an unlawful employment practice under Title VII."

[13]See, JA p.18. Petitioner received a notice of right to sue on or about July 5, 1983; however, this action was not instituted until January 25, 1984 and any cause of action stated under Title VII would have at that time been barred by the applicable statute of limitations.

Respondent has conceded that intentional racial animus is an element of and therefore relevant to Petitioner's claims of racially discriminatory discharge and promotion practices. However, several lower federal court cases have commented that separate claims for racial harassment are not cognizable under § 1981. *See, e.g., Williams v. Atchison, Topeka and Santa Fe Ry.*, 627 F.Supp. 732 (W.D.Mo. 1986); *Minority Police Officers Ass. of South Bend v. City of South Bend, Indiana*, 617 F.Supp. 1330 (N.D.Ind. 1985) *aff'd* 801 F.2d 764 (7th Cir. 1986); and *Howard v. Lockheed-Georgia Co.*, 372 F.Supp. 854 (N.D.Ga. 1974).

In *Williams v. Atchison, Topeka and Santa Fe Ry.*, 627 F.Supp. 732 (W.D.Mo. 1986), the court stated:

> "I believe the working conditions issue is a Title VII issue *and not an independent issue under 42 U.S.C.* § 1981. *See Minority Police Officers v. City of South Bend*, 617 F.Supp. 1330, 1352 n.32 (N.D.Ind. 1985). It seems to be assumed in some cases, however, that the statutes run parallel, except for the more liberal damage potential of § 1981. *Ferbis v. Chrysler Plastic Products Corp.*, 772 F.2d 1250 (6th Cir. 1985) *cert. denied*, — U.S. —, 106 S.Ct. 1197 (1986). But Title VII by its terms is more comprehensive than § 1981, and, except as to damages and to time limits, cuts deeper."

Id. at 737 n.5 (emphasis added).

Further, in *Minority Police Officers Assn. of South Bend v. City of South Bend, Indiana*, 617 F.Supp. 1325 (N.D.Ind. 1985), the court stated:

> The relationship between the employee and his working environment is encompassed within the 'terms, conditions or privileges of employment' language of Title VII. Section 1981 of Title 42 United States Code is not specifically addressed to employment discrimination and *this court has found no cases to indicate a plaintiff can state a claim under § 1981 based on working conditions alone.* However, conditions in the work place, including racially derogatory slurs and incidents may be used to show discriminatory intent. Nor has the Court found any cases indicating that such a claim can be stated under the Fourteenth Amendment.

Id. at 1332 at n.32 (emphasis added).

In *Howard v. Lockheed-Georgia Co.*, 372 F.Supp. 854 (N.D.Ga. 1974), an attempt to use § 1981 for the purpose of seeking emotional distress damages was rejected. The Court stated that:

> [T]o judicially legislate a concurrent and broader remedy under Section 1981 would invite every plaintiff asserting a claim for racially discriminatory employment practices to ignore the remedy which Congress so carefully constructed in Title VII. Why should a claimant genuinely participate in the conciliation procedures of Title VII, or his attorney advise him to do so, when larger awards await if he refuses and proceeds to suit? Such a holding would frustrate the clear intent of Congress that racial bias problems be resolved by conciliation. This the Court declines to do.

Id. at 857-858.

The pivotal issue in a determination of this case is an interpretation of the meaning of "to make and enforce contracts." To make such a determination, a closer look at the Legislative History of the statute and an interpretation of the clear ordinary language of the statute is helpful.

The Legislative History of § 1981 has been discussed and analyzed on several occasions by this Court. *See, e.g. Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon v. McCrary*, 427 U.S. 160 (1976). This Court has determined that 42 U.S.C. § 1981 was drawn from both § 16 of the Voting Rights Act of 1870 and from § 1 of the Civil Rights Act of 1866. *Runyon v. McCrary*, 427 U.S. 160, 168 n.8 (1976).[18]

During Reconstruction and the passage of these statutes, slaves for the first time were declared to be "citizens", to possess the rights to sue, to give evidence and to hold real and personal property, and to have full access to all the laws and be subject to all the responsibilities of citizenship. The grant of these rights to "all people" by § 1981 is primarily a grant of "capacity" rather than the substantive rights that flow from capacity. For the first time, slaves were given access to the courts and access to equal legal rights. It was not the intent of Congress to create a substantive tort of action for racial harassment by the passage of these statutes.[19]

In discussing the authority of Congress to enact the Civil Rights Act of 1866 under the Thirteenth Amendment, this Court wrote that:

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[18]However, in a dissenting opinion addressing the legislative history of 42 U.S.C. § 1981, two Justices of the Court concluded that this Section was derived solely from § 16 of the Voting Rights Act of 1870 which was passed under Congress' Fourteenth Amendment powers rather than § 1 of the Civil Rights Act of 1866 which was passed under Congress' Thirteenth Amendment powers. *Runyon v. McCrary*, 427 U.S. at 202 (1976); (White, J., joined by Rehnquist, J., dissenting.)

[19]However it is now established that § 1981 does create substantive rights to contract. *See Johnson v. Railway Express*

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> Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say the determination Congress has made is an irrational one. For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its "burdens and disabilities"—include restraints upon "*those fundamental rights which are the essence of civil freedom*, namely, the same right . . . to inherit, purchase, lease, sale and convey property, as is enjoyed by white citizens."

Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440-441 (1968) (footnote omitted) (quoting Civil Rights Cases, 109 U.S. 3, 22 (1883) (emphasis added).

Further, the Court wrote:

> Of course, Senator Trumbull's bill would, as he pointed out, 'destroy all [the] discriminations' embodied in the Black Codes, but it would do more: it would affirmatively secure for all men, whatever their race or color, what the Senator called the 'great fundamental rights': the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. As to those basic civil rights, the Senator said, the bill would 'break down *all* discrimination between black men and white men.'

Id. at 422 (emphasis in original).

It is logical to assume that Congress meant fundamental legal capacities. Additionally, Senator Trumbull's remarks chiefly address economic rights. There is a great contrast between bestowing the capacity to contract or the right or capacity to enforce legal rights in the courts and

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Agency, 421 U.S. 454, 457-461, 44 L.Ed.2d 295, 95 S.Ct. 1716 (1975). *See also Sullivan v. Little Hunting Park*, 396 U.S. 229, 237-238, 24 L.Ed.2d 386, 90 S.Ct. 400 (1969).

the grant of substantive rights and causes of action sounding in tort which necessarily regulate interpersonal relationships. Such an interpretation goes far beyond "those *basic civil rights*," protected by the statute.

In his concurring opinion in *Runyon v. McCrary*, 427 U.S. 160 (1976), Justice Stevens clearly and succinctly declared:

> There is no doubt in my mind that the construction of the statute would have amazed the legislators who voted for it. Both its language and the historical setting in which it was enacted convince me that Congress intended only to guarantee all citizens the same *legal capacity to make and enforce contracts*, to obtain, own, and convey property and to litigate and give evidence.

Id. at 189 (emphasis added).

Further, the dissent by Justice White with whom Justice Rehnquist joined states:

> What is conferred by 42 U.S.C. § 1981 is the *right*—which was enjoined by whites—'to make contracts' with other willing parties and to 'enforce' those contracts in court. Section 1981 would thus invalidate any state statute or court made rule of law which would have the effect of disabling Negroes or any other class of persons from making contracts or enforcing contractual obligations or otherwise giving less weight to their obligations than is given to contractual obligations running to whites. . . .
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> . . . The legislative history of 42 U.S.C. § 1981 confirms that *the statute means what it says and no more, i.e., that it outlaws any legal rule establishing any person from making or enforcing a contract . . .*"

Id. at 194-195 (footnote omitted) (emphasis added).

Even the explanation of the "classic violation of § 1981" in the majority opinion in *Runyon* resounds with concepts and phrases associated with traditional contractual relationships.

> [A] Negro's [§ 1981] right to 'make and enforce contracts' is violated if a private *offeror* refuses to ex-

> tend to a Negro, solely because he is a Negro, the same opportunity to *enter* into contracts as he *extends* to white *offerees*.
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> . . . The parents . . . sought to *enter into a contractual relationship* with [the schools]. Under those *contractual relationships*, the schools would have received *payments for services rendered*, and the prospective students would have received instruction *in return for those payments*. The educational services of [the schools] were advertised and *offered* to members of the general public. But neither school *offered services* on an equal basis to white and non-white students.

Id. at 170-173 (footnotes omitted) (emphasis added).

While Plaintiff cites *Runyon* to support their claim, in fact *Runyon* involved the defendants' direct refusal to enter into a contract with black applicants. The plaintiff was effectively denied the right to contract for educational services. Such a case presents a far different issue than where racial harassment is directed toward a student enrolled. While admittedly such conduct would be discriminatory, it would not deny the plaintiff the right to enter or enforce a contract. *See e.g. Saunders v. General Services Corp.*, Slip Op. No. 86-0229-R (E.D.Va. 1987), appeal pending, No. 87-2175 (4th Cir.).

In *General Building Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375 (1982), this Court addressed the duties under § 1981.

> The question is *what* duty does § 1981 impose. More precisely, does § 1981 impose a duty to refrain from intentionally denying blacks the right to contract on the same basis as whites or does it impose an affirmative obligation to insure that blacks enjoy such a right? The language of the statute does not speak in terms of duties. It merely declares specific rights held by '[a]ll persons within the jurisdiction of the United States.' We are confident that the Thirty-ninth Congress meant to do no more than prohibit the employers and associations in these cases from intentionally depriving black workers of the rights enu-

> merated in the statute, including the equal right to contract. . . ."

Id. at 396 (original emphasis).

In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), the Court determined that under § 1981 the running of the statute of limitations is not suspended during the pendency of a timely filed administrative complaint with the EEOC under Title VII. Although the employer conduct alleged to have occurred was discrimination with respect to seniority rules, job assignments *and* discharge, each of these are unique to the *economic* factors generally relevant to a contractual relationship. This is not inconsistent with the idea that § 1981 was passed to protect property and economic rights and does not address interpersonal relationships.

Further, the Court's language in *Jones*, 392 U.S. 409 (1968) supports the interpretation that § 1981 only confers the right to enter into a contract and bind the other party to it. In that decision, the Court stated simply that "the right to *contract* for employment [is] a right secured by 42 U.S.C. § 1981." *Jones*, 392 U.S. at 441 n.78 (emphasis added).

In *Jones*, the specific issue before the Court involved whether § 1982 applied to private, and not only state action in the sale or rental of property and, if so, whether such scope was constitutional. In its examination of § 1982, the Court compared § 1982 to the Fair Housing Act. Unlike the Fair Housing Act, the Court explained, § 1982 "is not a comprehensive open housing law." *Id.* 392 U.S. at 413 (1968). A like analysis should distinguish § 1981 from Title VII, for § 1981 is not a comprehensive employment law. In summary of the comparison between the two statutes, the Court noted the "vast differences between, on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property [] and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of authority." *Id.* at 417.

The above language supports the view that § 1981 was intended only to procure the opportunity, whether it is to contract for work or contract for education. After the contract is in effect, whatever conduct may violate an individual's rights, breach the contract or affect the terms or conditions of the contract, whether express or implied, is remedied by other laws. For example, an action under Title VII, an action for intentional infliction of emotional distress, breach of contract actions, malicious interference with contract or other actions may be instituted.[16]

Furthermore, this Court has recently very generally held in *Goodman v. Lukens Steel Co.*, 482 U.S. —, 107 S.Ct. 2617 (1987) that the Defendant company had violated both Title VII and § 1981 with regard to the discharge of employees during their probationary period, the toleration of racial harassment, initial job assignments, promotions and decisions on incentive pay. Such general language is used with regard to a case which includes activities, which is racially motivated, are obviously included in the protections offered by § 1981, i.e. promotion and discharge. Notwithstanding this general language, this Court also clearly stated that § 1981 grants competence and capacity to contract:

> Insofar as it deals with contracts, [§ 1981] declares the personal right to make and enforce contracts, a right, as the section has been construed, that may not be interefered with on racial grounds. The provision asserts in effect, that *competence and capacity to contract* shall not depend upon race.

Id. at —, 107 S.Ct. at 2621 (emphasis added).

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[16] The fallacy of the argument propounded by the government in the Amicus Brief filed by the Solicitor General is that there exists causes of actions for breach of contract or malicious interference with contract which are directly applicable to a "breach of the covenant of good faith and fair dealing." There is no reason to expand § 1981 far beyond any intent of the Thirty-ninth Congress in order to create a substantive right or remedy for such a cause of action under § 1981. Indeed § 1981 grants the capacity or competence of *all* persons to institute any such claims and does not necessarily create such a substantive cause of action.

In a separate opinion, Justice Brennan joined by Justice Marshall and Justice Blackmun, expressed the opinion that "Congress clearly believed that freedom would be empty for black men and women if they were not also assured an equal opportunity to engage in business, to work, and to bargain for sale of their labor." *Id.* at —, 107 S.Ct. at 2628. Justice Brennan further quoted from the legislative history:

> [Section 1981's] object is to secure to a poor, weak class of laborers the right to *make* contracts for their labor, the power to *enforce the payment* of their wages, and the means of *holding* and enjoying the proceeds of their toil. Cong. Globe, 39th Cong., 1st Sess. 1159 (1866) (Rep. Windom).

Id. at —, 107 S.Ct. at 2628 (emphasis added). Such language translates directly to prohibitions against racially discriminatory hiring and discharge practices and access to the courts. It is well established that § 1981 covers these matters. Again a dominant concern in the interpretation of § 1981 is the effect on economic rights. Justice Brennan further concluded that:

> [T]he historical origins of § 1981 therefore demonstrate its dominant concern with *economic* rights. The preeminence of this concern is even clearer if one looks at § 1981 in conjunction with 42 U.S.C.S. § 1982. [42 U.S.C. § 1982] which was simultaneously enacted. The plain language of § 1982 speaks *squarely and exclusively to economic rights* and relations.
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> . . . [I]t is apparent that the primary thrust of the 1866 Congress was the provision of equal rights and treatment in the matrix of *contractual* and *quasi contractual relationships* that form the *economic* sphere.

Id. at —, 107 S.Ct. at 2629 (emphasis added) (Brennan, J., joined by Marshall and Blackmun, J.J., concurring in part and dissenting in part).

In *Tillman v. Wheaton-Haven Rec. Asso.*, 410 U.S. 431 (1973), it was held that an association which operated a community swimming pool was not a private club and

> expectations arising from the deputy's employment. The Sheriff *promised to pay* his deputies a stated salary. In return, the deputies *promised to perform* their jobs. We hold that the employment relationship represented in this case was sufficient to bring Adams under the protective umbrella of § 1981.

Id., at 108 (emphasis added). The explanation of the Court clearly invokes concepts traditionally associated with the right to make and enforce contracts.

In *Howard Security Services, Inc. v. Johns Hopkins Hospital*, 516 F.Supp. 508 (D.Md. 1981), the District Court upheld the Plaintiff corporation's § 1981 cause of action based upon the hospital's alleged refusal to *award a contract* to the corporation because the president was black. Again, as *Howard* indicates, § 1981 addresses the right to make contracts and the legal right to enforce contracts. Other cases likewise support the view that § 1981 protects merely the right to make and enforce contracts."

That § 1981 is addressed solely to the legal capacity to contract is discussed in detail in the dissenting opinion by Justice White, joined by Justice Rhenquist in *Runyon*. The opinion states:

> Thus the legislative history of § 1981 unequivocally confirms that Congress' purpose in enacting that statute was solely to grant to all persons equal capacity to contract as is enjoyed by whites. . . ."

Runyon, 427 U.S. at 205. The opinion continued with a close look at such legislative history:

> The fact that one of the leaders of the efforts to pass the Thirteenth Amendment statutes—Senator Stewart—included the right to 'make contracts' but not the right to 'purchase, etc., real and personal property' in the Fourteenth Amendment statute providing for equal rights under law which he sponsored

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[17]See e.g. *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975) (the Court recognized the Plaintiff's cause of action under § 1981 against an employer for refusing to hire the Plaintiff because his wife was black); *Macklin v. Spector Freight Systems*, 478 F.2d 979 (D.C.Cir. 1973) (Court of Appeals upholding Plaintiff's § 1981 claim alleging a practice of refusing to hire blacks).

that denial of membership to a Negro couple violated 42 U.S.C. § 1982. The Court noted that the operative language of both §§ 1981 and 1982 was traceable to the act of April 9, 1866 and saw no reason to construe those sections differently when applied to these facts. *Id.* at 410-411. In reaching its conclusions, this Court looked closely at the economic impact and quoted from the dissent in the lower court:

> Several years from now it may well be that a white neighbor can sell his home at a considerably higher price than Dr. and Mrs. Press because the white owner will be able to assure his purchaser of an option for membership in Wheaton-Haven. Dr. and Mrs. Press, however are denied this advantage. 451 F.2d at 1223.

Id. at 437.

This Court further noted that "the automatic waiting-list preference given to residents of the favored area may have affected the price paid by the Presses when they bought their home. Thus the purchase price to them . . . may well reflect benefits dependent on residency in the preference area." *Id.* at 437. The emphasis on purchase price reflects that the economic factors were those being protected in these statutes, not the right to bring an action solely based on racially motivated slurs and incidents in the workplace.

Lower federal courts have also made it clear that § 1981 was intended to protect economic contractual relationships. Whereas, Title VII was intended by Congress to prohibit a discriminatory and offensive work environment. For example, the Fifth Circuit in *Adams v. McDougal*, 695 F.2d 104 (5th Cir. 1983) discussed the applicability of § 1981 to contracting for employment:

> The term *contract*, as used in § 1981, refers to 'a right in the *promissee* against the *promissor*, with a correlative special duty in the *promissor* to the *promissee* of rendering the performance promised.' *Cook v. Advertiser Co.*, 458 F.2d 1119, 1123 (5th Cir. 1972) (Wisdom, J., concurring).
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> In this case, despite the indefinite tenure of the job of the deputy sheriff, the sheriff and his deputies had

four years later *is strong evidence of the fact that Congress always viewed the right to 'make contracts' as simply granting equal legal capacity to contract....* Indeed, Senator Stewart specifically drew a distinction between the rights enumerated in the Fourteenth Amendment statute including the right to 'make contracts' and the real and personal property rights not so included. In connection with the Fourteenth Amendment statute he was asked:

> 'MR. POMEROY. I have not examined this Bill, and I desire to ask the Senator from Nevada a question. I understood him to say that this Bill gave the same civil rights to all persons in the United States which are enjoyed by citizens of the United States. Is that it?'

He replied:

> 'MR. STEWART. *No; it gives all the protection of the laws.* If the Senator will examine this Bill in connection with the original civil rights bill, he will see that it has no reference to inheriting or holding real estate.'

Id. at 209-210 (White, Rhenquist, J.J. dissenting) (original emphasis).

Justice White proved to be prophetic when he stated that "imaginative judicial construction of the word 'contract' is foreseeable." *Id.* at 212.[18]

No court has yet attempted to analyze and clarify the full extent of the distinctions between § 1981 and Title VII. Obviously, in the case of racially discriminatory promotion and discharge, there is an overlap of rights. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460-462 (1975) (promotion); *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (1972) (discharge). Title VII clearly

[18]Although the dissent opposed the extension and "reach of 42 U.S.C. § 1981 so as to establish a general prohibition against a private individual's or institution's refusing to enter into a contract with another person because of that person's race," *Id.* 427 U.S. at 192, the discussion of the legislative history and the plain meaning of the "right to make and enforce contracts," is equally applicable to this case.

covers a racially hostile work environment. *Rogers v. EEOC* 454 F.2d 234 (5th Cir. 1972); and at least some courts, including the Fourth Circuit in the case *sub judice*, have determined that such a claim is not actionable under § 1981. *Patterson v. McLean*, 805 F.2d 1143, 1145 (4th Cir. 1986). Other courts have recognized the danger in expanding § 1981 to cover all employment discrimination "against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race." 42 U.S.C. § 2000(e)(2)(a): *See, Williams v. Atchison, Topeka and Santa Fe Ry.*, 627 F.Supp. 732 (W.D.Mo. 1986); *Minority Police Officers Ass'n of South Bend v. City of South Bend, Indiana*, 617 F.Supp. 1330 (N.D.Ind. 1985); *Howard v. Lockheed-Georgia Co.*, 372 F.Supp. 854 (N.D.Ga. 1974).

If this Court determines that § 1981 broadly covers all incidents of the contractual relationship as is suggested by the Petitioner, then such a holding would grant broader and greater remedies in cases of racial discrimination than in cases of sexual discrimination, discrimination based upon age, religious discrimination, or discrimination based upon national origin. The ultimate effect and result is that Title VII and the conciliatory procedures so carefully constructed therein will become both unnecessary, useless and unadvisable because of the potential for greater monetary awards for racial harassment under § 1981. Surely this was not the intent of Congress.

The obvious distinction between Title VII and § 1981 in cases of racial discrimination is that § 1981 grants the capacity and competence to make and enter legal and binding contracts; while Title VII regulates the conditions of the work environment. As pointed out by the Fourth Circuit, "racially discriminatory hiring, firing and promotion go to the very existence and nature of the employment contract and thus fall easily within § 1981's protection." *Patterson v. McLean*, 805 F.2d at 1145.

The plain simple language of § 1981 grants no more than the right of all persons to enter into and enforce promissory agreements that create a legal relation to do

or not to do a particular thing. A common sense reading of § 1981 supports the contention that the Thirty-Ninth Congress did not intend that the statute broadly cover racial harassment in the work place. On the other hand, racial animus that results in discriminatory hiring, promotion or discharge decisions is under the umbrella of § 1981 rights. Certainly, Respondent is aware of no case authority or legislative history indicating that in the Nineteenth Century whites were entitled to maintain actions against their employer for racial harassment. The statute grants only to "all persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ." In contrast, rights to institute actions for all harassment were conferred by Title VII.

B. A Separate Discrete Action For Racial Harassment Under Section 1981 Cannot Stand Alone.

Many cases in the lower federal courts and even decisions by this Court have added to the difficulty in differentiating the "separate, distinct and independent" remedies available under Title VII and under § 1981.[19] *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

Obviously, many cases are prosecuted where claims are made under both Title VII and § 1981; and, many cases are prosecuted under both Title VII and § 1981 jointly where there are not only claims of racial harassment but racially discriminatory practices of hiring, firing and discharge. Because the statutes do overlap and the offer of proof is similar, there is seldom a need for the

[19]See, e.g. *Goodman v. Lukens Steel Co.*, 42 U.S. —, 107 S.Ct. 2617 (1987) (generally holding the Union was in violation of both Title VII and § 1981 for the toleration and tacit encouragement of racial harassment among other things.); *Lucero v Beth Israel Hospital Geriatric*, 479 F.Supp. 452 (D.C.Col. 1979) (recovery allowed to Plaintiff for compensatory damage for mental pain and suffering under § 1981 where Plaintiff brought claims under both Title VII and § 1981); *Block v. R.H. Macy and Co.*, 712 F.2d 1241 (8th Cir. 1983) (recovery permitted under § 1981 for emotional distress in conjunction with her claim under Title VII and § 1981 for racially discriminatory discharge).

courts to differentiate under which statute a particular claim is sustained.

Generally, however, the cases have not supported an independent claim for racial harassment or hostile working environment under § 1981 separate and apart from claims under Title VII or collateral claims of racially discriminatory promotion and discharge practices under § 1981.[20] This is the basis of the Fourth Circuit's decision that a separate independent claim for racial harassment, standing alone, is not cognizable under § 1981. *Patterson*, 805 F.2d at 1145-1146. In response to the cases submitted by the Petitioner, the Fourth Circuit observed: "None directly holds that racial harassment gives rise to a discrete claim under § 1981, as distinguished from recognizing that racial harassment may be relevant as evidence of discriminatory intent supporting a cognizable claim of employment discrimination under § 1981 and that it may give rise to a discrete Title VII claim." *Id.* at 1146.

In *Whiting v. Jackson State Univ.*, 616 F.2d 116 (5th Cir. 1980), the court observed:

> [w]hen § 1981 is used as a *parallel basis* for relief with Section 706 of Title VII against disparate treatment in employment, its elements appear to be identical to those of Section 706. *Garcia* [*v. Gloor*], 609 F.2d [156] at 164; *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *see also, Johnson v. Alexander*, 572 F.2d 1219, 1223 n.3 (and cases cited therein) (8th Cir. 1978), *cert. denied*, 439 U.S. 99 [] (1978).

Id. 616 F.2d at 121. (emphasis added).

In *Hamilton v. Rogers*, 791 F.2d 439 (5th Cir. 1986), the claimant brought claims under §§ 1981, 1983 and Title VII for alleged racial harassment and retaliation. The Court (on rehearing) held that the employer was liable only under Title VII. *Id.* at 445. A reading of the ap-

[20]Cf. *Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250 (6th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 1197 (1986) (submission of an issue to the jury under § 1981 by Mexican American for a claim of a hostile working environment allowed by the Sixth Circuit).

propriate part of the opinion shows that the court, in restating the familiar *McDonnell-Douglass* proof scheme completes its analysis by concluding that "successfully meeting these requirements [the McDonnell-Douglass proof scheme] would also establish a successful case under 42 U.S.C. §§ 1981 and 1983; *when* these statutes are used as *parallel causes of action with Title VII*, they require the same proof to show liability. *Id.* at 442.

Petitioner contends that the lower federal courts have "unanimously concluded that discrimination in the terms and conditions of employment is actionable under § 1981.[21] However, these cases involve parallel Title VII claims or claims involving promotion or discharge where harassment is an element of the claim rather than a separate distinct claim.[22]

Even assuming *arguendo* that a separate discrete claim for racial harassment *may be* cognizable under § 1981, there is no ruling that such an issue *must be* submitted to a jury separate and apart from issues of promotion or discharge discrimination. In fact, most of the cases cited by the Petitioner involve cases where the claimant has brought claims under various federal statutes including §§ 1981, 1983 and Title VII for racial harassment, promotion discrimination, hiring discrimination, discharge discriminaton and other claims which may be cognizable under these various federal statutes. Part of the problem in determining what causes of action, as opposed to what remedies, may be cognizable under each of these statutes, is the failure of the various courts to distinguish precisely what separate substantive claims might be enforced under the various and potentially applicable statutes.

The many constructive discharge cases which have been determined in the lower courts are helpful because they demonstrate that racial harassment generally is an element necessary in such cases rather than a separate

[21] See Brief for Petitioner at p. 35, n.12.

[22] See Respondents' Brief in Opposition to Writ of Certiorari pp. 5-10 where these cases have previously been distinguished.

claim for relief. In *Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974), the court indicated that where intentional racial prejudice impacted a minority employee's opportunities for *promotion*, § 1981 may be violated.

In *Irving v. Dubuque Packing Co.*, 689 F.2d 170 (10th Cir. 1982), the court affirmed a jury finding of unlawful failure to promote and remanded a constructive discharge claim for a new trial. The Court stated:

> The constructive discharge is only actionable under 42 U.S.C. § 1981 if it is motivated by [] race []. In other words, an employee must be subjected to employment practices which are discriminatory and which make the working conditions intolerable, thus forcing the employee to quit. Further, the employer's action must be intended by the employer as an effort to force the employee to quit. *Muller v. United States Steel Corp.*, [509 F.2d 923 (10th Cir. 1975)]; *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981).

Id. at 172. The rationale is that racially discriminatory treatment which *impacts* on hiring, discharge or promotion decisions is actionable under § 1981 with regard to claims for racially discriminatory hiring, discharge or promotion decisions.

In *Martin v. Citibank, N.A.*, 762 F.2d 212 (7th Cir. 1985) the Court held that "[a] finding of constructive discharge in violation of § 1981 or Title VII requires that the trier of fact 'be satisfied that the * * * working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign'" (Citations omitted) *id.* at 221. In that case, "the evidence was insufficient as a matter of law to establish constructive discharge." The plaintiff testified that "her supervisor loudly mentioned her being polygraphed; complaints concerning her attitude to co-workers were unfounded; her supervisor had once given her the wrong combination to the night deposit box and that someone using his card once interfered with her deposit; and that she had been required to process deposit records while serving customers." *Id.* at 221.

In *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981), the court found no discrimination under § 1981 on plaintiffs' claims of disparate treatment and constructive discharge where plaintiffs alleged "close monitoring and harsh treatment . . . made his working conditions intolerable." "A constructive discharge exists when an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job." (Citations omitted). *Id.* at 1256. The court further stated that "a constructive discharge arises only when a reasonable person can find conditions intolerable." *Id.* at 1256. The court concluded by finding "no steady barrage of opprobrious racial comment" as would trigger a claim under Title VII. *Id.* at 1257.

Likewise, in *Muller v. United States Steel Corp.*, 509 F.2d 923 (10th Cir.) *cert. denied*, 423 U.S. 825 (1975), the court found that unfavorable job assignments and discriminatory failure to promote do not constitute constructive discharge. *Id.* at 929.

There is no controversy that racial harassment is an element of and a necessary part of the proof required in claims for racially discriminatory hiring, firing and promotion practices under § 1981. The significance of these cases is the degree of harassment necessary to support such claims. If the alleged practices are not so "opprobrious" as to support a claim of constructive discharge, then it is logical that such conduct cannot stand alone to support a claim for relief for racially discriminatory harassment or hostile working environment under § 1981. It is noteworthy that the Petitioner's claims alleging constructive discharge were dismissed by the trial judge upon Respondent's motion for summary judgment and are not before this Court.

C. Petitioner Has Failed To Sustain A Prima Facie Case Of Racial Harassment

Notwithstanding a determination that racial harassment or disparate treatment claims are cognizable under § 1981 absent a claim for racially discriminatory firing, hiring or promotion, this Petitioner has failed to present

evidence sufficient to support a claim of racial harassment even under Title VII.

It is established that the applicable statute of limitations for a claim for relief under 42 U.S.C. § 1981 is controlled by state law. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). Section 1981 actions arising in North Carolina come under the provisions of North Carolina General Statute § 1-52 which sets forth a three year statute of limitations. *Lattimore v. Loews Theatres, Inc.*, 410 F.Supp. 1397 (M.D.N.C. 1975); *Broadnax v. Burlington Industries, Inc.*, 7 FEP cases, 252 (M.D.N.C. 1972). Therefore, the only claims which are actionable under § 1981 are those claims which fall within the three years preceding the filing of the complaint on January 25, 1984.

The record reflects only two allegations of racial remarks. At the time of Petitioner's initial interview in 1972, Respondent's President allegedly informed her that she would be working only with white women. The only other statement which Petitioner testified was a racial remark was the statement allegedly attributed to Respondent's President that—"blacks were slower than whites by nature." Likewise, by her own admission, this alleged racial comment was made in 1976, well outside the applicable period of limitations.[23] Petitioner also testified that she received personal criticism during staff meetings, that she was given an excessive work load, that she was required to dust and sweep, and that the Respondent's President stared at her. This was the substance of her evidence in support of her claim for racial harassment.

Following this evidence, the trial court heard oral argument with regard to whether or not the Petitioner

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[23]TR 1-19, TR 1-88 (Although these alleged instances are far outside the applicable three year statute of limitations, the district court allowed the testimony as background and to support the element of intent required in a § 1981 case. However, they are not independently cognizable under Title VII or § 1981 because of the statute of limitations bar. *See, e.g., Lattimore v. Loews Theatres, Inc.*, 410 F.Supp. 1397 (M.D.N.C. 1975); *Broadnax v. Burlington Industries, Inc.*, 7 FEP cases, 252 (M.D.N.C. 1972).

Petitioner had failed to present a *prima facie* case of harassment.

The Eleventh Circuit in *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) has recognized that:

> [T]he 'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' does not affect the terms, conditions, or privileges of employment to a sufficiently significant degree to violate Title VII. For [] harassment to state a claim under Title VII, it must be *sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment.*

682 F.2d at 904 (citing *Rogers v. Equal Employment Opportunity Comm'n.*, 454 F.2d 234, 238 (5th Cir. 1971) *cert. denied*, 406 U.S. 957, (1972)).

All of the alleged racial slurs clearly occurred outside the statute of limitations applicable to a § 1981 claim and Petitioner's remaining allegations that Respondent's president stared at her, criticized her in meetings and gave her an inordinate amount of work fall far short of conditions "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment."

Even if these alleged incidents of harassment were sufficient to support a *prima facie* case, Respondent's proffered explanations of justifiable employee supervision and observation,[30] Petitioner's long history of slow work performance[31], and legitimate review and critique of employee performance at staff meetings[32] more than overcame Petitioner's initial burden. Petitioner offered no rebuttal to Respondent's proffered explanations nor did she offer any evidence that such explanations were merely pretextual. *See, McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Lastly, there is no evidence that Petitioner ever complained about any of the circumstances she now contends

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[30]TR 3-109 to 3-110

[31]See, *n.7, supra.*

[32]TR 3-110 to 3-111.

had established a *prima facie* case of racial harassment occurring within the three year period of limitations.[24] The trial court expressed the opinion that the Petitioner had not yet made a *prima facie* case of harassment[25] but allowed the Petitioner to continue her presentation of evidence to facilitate an out of state witness, with the warning that "when all the evidence is in, I'll just have to make a ruling and straighten it out with the jury if it is allowed to go to the jury."[26] Petitioner produced no further evidence of personal racial harassment and the court's opinion at this point was tantamount to the dismissal of her claim on the basis of insufficient evidence. The formal ruling of dismissal followed Respondent's Motion under Rule 50 at the end of the Petitioner's evidence.

In later oral argument, the trial court expressed its opinion to counsel for the Petitioner that "[y]ou're very weak on your question of harassment other than characterization of counsel and the witnesses."[27] The court stated that at this point in the trial, the Petitioner's evidence supported only two hostile, discrete acts, one failure to promote and the termination.[28] Finally, at the Respondent's motion for a directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure at the end of the Petitioner's evidence, the trial court ruled:[29]

> . . . [i]f the jury finds a history of racial harassment which culminated in failure to promote and discharge of the Plaintiff, they can take that into consideration. But it is not a separate claim under Title—under Section 1981, in my opinion, *in the context of this case.*

It is clear from the judge's ruling that even if a claim for racial harassment or racial mistreatment were cognizable under § 1981 that "in the context of this case," the

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[24]TR 1-66 to 1-80

[25]TR 1-77

[26]TR 1-79

[27]TR 2-152

[28]TR 2-153

[29]TR 3-75

embrace racial harassment. Neither did Petitioner pursue her claim of constructive discharge. Certainly, a working environment heavily charged with discrimination may constitute an unlawful practice under Title VII. *Rogers v. Equal Employment Opportunity Comm'n.*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). However, Petitioner's allegations are insufficient to support such a claim under Title VII or under § 1981 if this Court finds such a claim is cognizable.

II.

PETITIONER HAS NOT SUSTAINED A CLAIM FOR PROMOTION DISCRIMINATION UNDER § 1981

A. Petitioner Has Failed To Present Sufficient Evidence To Support A Prima Facie Claim Of Promotion Discrimination Under § 1981

The Petitioner contends that because of racial discrimination, she was denied a job advancement received by Susan Williamson from Account Junior to Account Intermediate.[33] At the time of this advancement by Mrs. Williamson within the accounting section, Petitioner was a file clerk.[34]

To make a *prima facie* case, the Plaintiff must establish the four familiar elements required by *McDonnell-Douglas:*

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; (v) that, after his rejection, the positon remaneid open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.

Additionally, a claim under § 1981 can be sustained only with the proof of intentional purposeful discrimination. *General Building Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982).

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[33]TR 1-46 to 1-48

[34]TR 1-99

Petitioner's proof does not establish a *prima facie* claim and therefore should have been dismissed without submission of the issue to the jury.[35] Petitioner could not prove that the employer was seeking applicants for the position of Account Intermediate nor that she applied for or was qualified for such a position. In fact, the only element under the *McDonnell-Douglas* proof scheme which Petitioner could prove in support of her *prima facie* case was that she was a member of a racial minority.

The facts of this case do not present a traditional or classic promotion discrimination claim. There was no job opening for which notices were posted or application solicited. There were no new jobs on the nine person clerical staff. Here, the evidence was clear and uncontradicted that there were no job vacancies, that Ms. Williamson received only a title change and raise, and that Ms. Williamson did not change job functions or responsibilities or even the place where she worked. Further, she continued to be supervised by the same supervisor, and the "promotion" was merely a reflection of her satisfactory performance in order to allow her to move to a higher job title.[36] During this period of time, the Petitioner worked as a filing clerk and was not performing any accounting functions.

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[35]The test on directing a verdict under Rule 50 is not whether there is any evidence, but whether "there are no controverted issues of fact upon which reasonable men could differ." 5A Moore's Federal Practice (2d Ed. 1971), § 50.02[1]; *Brady v. Southern Railroad Company*, 320 U.S. 476, 479-480 (1943); *Pinehurst, Inc. v. Schlarnowitz*, 351 F.2d 509, 513 (4th Cir. 1965); *Pogue v. Retail Credit Company*, 453 F.2d 336 (4th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

"The Federal Courts are generally committed to a rejection of the so-called 'scintilla rule,' by which a Court might not direct a verdict so long as there is any evidence in support of the proposition tendered by the part against whom the motion is direct." 5A Moore's Federal Practice (2d Ed. 1971), § 50.02[1]; *Boeing Company v. Shipman*, 411 F.2d 365, 372, 373 (5th Cir. 1969); *Beaty Shopping Center, Inc. v. Monarch Insurance Company*, 315 F.2d 467 (4th Cir. 1963).

[36]TR 4-26 to 4-28

Under no imaginative argument could this advancement or "promotion" of Mrs. Williamsen be described as a "job opening for which the employer was seeking applicants". However, once the plaintiff had made a claim that *she* was entitle to this position (for the first time some three years following the promotion); the Respondent, is forced by a strict application of the *McDonnell-Douglas* proof scheme to articulate some non-discriminatory reason for its actions.

In this situation, an employer should not be forced to explain every promotion or advancement decision simply because a disgruntled employee has retrospectively made a self-serving determination and allegation that *she* was entitled to such advancement. The method of proof was "never intended to be rigid, mechanized, or ritualistic." *Furnco Construction Corp. v. Waters*, 438 U.S. 467, 477 (1978). "The facts necessarily will vary in Title VII cases, and the specification . . . of the *prima facie* proof required from [the Plaintiff] is not necessarily applicable in every respect to differing factual situations." *McDonnell-Douglass Corp. v. Green*, 411 U.S. 792, 802, n.13 (1973). To have considered or given the advancement received by Mrs. Williamson to the Petitioner would have forced the employer to supplant Mrs. Williamson from the job that she had been performing in an exceptional manner.

The Petitioner has submitted no evidence that would support the necessary determination that the decision to advance Mrs. Patterson was based upon an intent to racially discriminate against the Petitioner and that race was a motivating factor in denying such an advancement to the Petitioner.

It is obvious from the record that Ms. Williamson was qualified for the position for she continued the same job responsibilities she had been previously performing satisfactorily. (Williamson had college level calculus, accounting and business finance and eight years experience in the accounting area.) Likewise, it is blatantly obvious from the record that the Petitioner was absolutely unqualified for the position. (Petitioner was able to correctly answer

only one of fifteen arimetic questions on her application. She made numerous errors on the teller line. She lacked the knowledge to work in other areas of the office. Petitioner disliked teller work which required less mathematic skill and aptitute than the accounting job).

The employer has the right to fix the qualifications that are "necessary or preferred" in selecting the employee for promotion, and, in order to make out a *prima facie* case, a plaintiff must establish that she meets these qualifications. *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 671 (4th Cir. 1983) *rev'd on other grounds sub nom Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984). The cold, hard reality of the facts presented and the only reasonable inference which any reasonable person could draw is that there was no "promotion" for which there was a vacancy and the Petitioner produced not even a scintilla of evidence that she qualified for the position of Account Intermediate. Therefore, this claim should have been dismissed prior to submission to the jury.

However, as is often the case, the court submitted the issue to the jury for its consideration. Obviously, in the event of a verdict adverse to the employer, the trial judge would have had the opportunity to re-consider the *prima facie* proof at the Respondent's motion for a judgment notwithstanding the verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure. Once the jury returned a verdict in favor of the Respondent, this was not necessary.[37]

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[37]The Fourth Circuit has recognized the propriety of granting a directed verdict or judgment n.o.v. for the Employer-Defendant in a discrimination-jury case. *Lovelace v. Sherwin Williams Company*, 681 F.2d 230 (4th Cir. 1982).

The court outlined a general procedural doctrine to determine the sufficiency of the evidence required in a jury trial to survive defendant's challenge by motion for a directed verdict:

"(a) The first question is whether Plaintiff's evidence may have carried the original production burden without need

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to invoke the *McDonnell Douglass* presumption . . . If . . . the plaintiff's evidence fails even to support the unadmitted predicates of the presumption so that it may not be invoked to carry this original burden, inquiries similarly end and the motion can be granted. (b) If the plaintiff's evidence supports the predicates of the presumption without regard to any additional probative force the evidence may have, inquiry must then proceed to whether the defendant has carried the production burden of rebutting the presumption by 'admissible evidence' that is 'legally sufficient' as justification. *See, Burdine*, 450 U.S. at 255, 258, 101 S.Ct. at 1094, 1096; *Loeb*, 600 F.2d at 1016 & n.16 (c) If the defendant's evidence fails to carry this burden, inquiry ceases . . . if on the other hand, the Defendant's evidence carries this burden so that the presumption's force is dispelled, inquiry must proceed to the plaintiff's re-acquired production burden. (d) This burden relates against to the motivational issue but now as re-cast by the defendant's proffered explanation into the more specific form whether as between the plaintiff's [race] and the defendant's proffered reason, [race] is the 'more likely.' In assessing whether this re-cast burden of production has been carried, the Court may properly consider plaintiff's evidence offered to establish the dispelled presumption along with any design to show defendant's proffered explanation to be a pretextual one. If the burden is carried, the case is for the jury under proper instructions defining the motivational issue as ultimately framed at the 'new level of specificity' created by the defendant's rebutting evidence. If this ultimate burden is not carried, the defendant's motion should, of course, be granted, even though the plaintiff's original burden of production was carried by force of the presumption."

Id. at 240-41 (1982). The Court acknowledged that it was "a very close question" as to whether or not the plaintiff had met his initial burden of proof and established a *prima facie* case. However, for the purpose of the appeal, the court assumed that the plaintiff had met its burden and directed its attention to whether the defendant-employer carried its burden to dispel the mandatory presumption:

> "The question here is simply whether the defendant has 'introduced . . . admissible evidence' of a 'legitimate nondiscriminatory reason' that is 'legally sufficient to justify a judgment for the defendant.' *Burdine*, 450 U.S. at 254-55, 256-56, 101 S.Ct. at 1095-1096. There is no doubt that this relatively modest burden was carried. . . . At this point,

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The promotion of Susan Williamson from Account Junior to Account Intermediate is comparable to the promotion of an associate lawyer in a law firm to partnership. The Petitioner's claim that she was entitled to the position of Account Intermediate is equivalent to the claim of a minority paralegal in such a firm that she should be granted the position of partner, rather than the associate attorney. Both claims are significantly absurd in that they establish no *prima facie* cause of action for discriminatory employment practices, whether or not the decision maker may have exhibited prior racial bias.

B. Under The Facts Of This Case, The Jury Instruction Was Correct.

The Defendant Court instructed the jury that in order for the Petitioner to prevail upon the issue of promotion discrimination, it was necessary that she prove that she was more qualified to receive the promotion than the person receiving such promotion and that under § 1981 she must show intentional discrimination.[38] Petitioner incorrectly contends that the district court erred by looking at the wrong question.[39] But in fact, the district court succinctly charged the jury as follows:

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> in the assessment, the probative force of the [plaintiff's] presumption had been completely dispelled.

Id. at 244. The court looked further at the plaintiff's new production burden as whether the circumstantial evidence supports as a reasonable probability the inference that but for claimant's [age] he would not have been demoted." *Lovelace*, at 244.

The court concluded that:

> "When, as is proper, the unrefuted basic facts underlying the employer's proffered explanation of the [failure to promote or layoff] are taken into account in assessing the reasonableness of the necessary inference, . . . the district court [may] properly [grant a directed verdict] or judgment n.o.v."

Lovelace at 246.

[38] JA 40-42

[39] Brief for Petitioner at p.64.

"You should consider *all the evidence, direct and circumstantial,* to determine whether Plaintiff was not promoted because of her race *or* because of the reasons given by the Defendant. In making this determination, you should keep in mind that *the ultimate factual question for you to answer is whether the Plaintiff was the victim of an unfavorable employment decision because of the Defendant's intentional discrimination against her because of her race.*"

JA p. 42 (emphasis added).

Learned counsel for the Petitioner has submitted a well reasoned and compelling legal argument with regard to the various ways in which a plaintiff might prevail:

> Where the employer articulates the selectee's alleged superior qualifications as the reason for its decision, the Plaintiff may still prevail without proving that her own qualifications are superior. In that situation, the plaintiff may prevail *either* by showing that her own qualifications are superior *or* by convincing the fact finder that the employer did not actually rely on a comparison of the candidates qualifications in making its decision.

Brief for Petitioner at p.65. This Court has determined that an "employer has discretion to choose among equally qualified candidates provided that the decision is not based upon unlawful criteria." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 259 (1981). Stated another way, if the employer has the discretion to choose between equally qualified candidates, *and there is no evidence of unlawful criteria,* then surely it is encumbent upon a Plaintiff to show that she is "more qualified" in order to prevail, where she has offered no other evidence of pretext.

Because of the unique factual situation represented in this case where there were no job openings or vacancies and the alleged incident of promotion discrimination involved merely a title change rather than a change in job functions or responsibilities, Respondent could articulate

no more obvious reason for its decision than the qualifications of Mrs. Williamson.

With regard to this specific employment decision, the Petitioner was unable to present *any* evidence which would support a finding that the employer did not actually rely on a comparison of the candidates qualifications in making its decision. Therefore, by Petitioner's own reasoning, she can prevail only by showing that her qualifications are superior. This is precisely the result which the trial court reached and the obvious basis upon which the trial court charged the jury.

The Petitioner was granted every opportunity to present evidence to support her contention that this employment decision was based upon "unlawful criteria." However, with regard to this employment decision, no competent evidence was submitted. Certainly, discriminatory intent may be proved in a variety of methods as Petitioner contends. However, under the unique facts of this case, the Fourth Circuit properly upheld the lower court's charge regarding "superior qualifications." In effect, the trial court found no "unlawful criteria" as a matter of law and submitted, the case to the jury for a factual determination of relative qualifications. Petitioner consistently maintained at trial that any deficiency in qualifications were the result of discriminatory training opportunities and the judge charged the jury accordingly allowing the jury to factually determine the issue of inadequate training and its impact on qualifications. JA 41.

The familiar proof scheme applicable to cases of racial discrimination was first articulated in *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973). The initial burden of proof to establish a *prima facie* case or racial discrimination is on the Plaintiff. Once the claimant has established a *prima facie* case, the burden of production is on the defendant to articulate a non-discriminatory motive for the employment decisions. The burden of proof is then on the plaintiff to show that the reasons proffered by the defendant were in fact pretextual.

Once the trial court allowed this case to go beyond the *prima facie* stage, the employer was compelled to articulate a non-discriminatory reason for advancing Mrs. Williamson to Account Intermediate. The very simple explanation for such a decision was Mrs. Williamson's quality of performance in undertaking her job responsibilities. Within the context of established case law, this proffered explanation most closely translated as a decision based on superior qualifications.

The trial court then relied on established Fourth Circuit cases which state:

> The rule in this Circuit is that where relative qualifications are advanced as the non-discriminatory reason for an employment decision, the plaintiff has the burden of establishing that she was better qualified than the successful applicant. *Anderson v. City of Bessemer*, 717 F.2d 149, 153 (4th Cir. 1983), [*rev'd on other grounds*, 470 U.S. 564 (1985)]; *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 672 (4th Cir. 1983) [*rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984).]

Young v. Lehman, 748 F.2d 194 (4th Cir. 1984). This Fourth Circuit rule is not inconsistent with the decision of this Court that "the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

Petitioner has confused the various elements necessary to support her claim of promotion discrimination. To carry her burden and sustain a claim under § 1981, a Plaintiff must always show intentional discrimination. *General Building Contractors v. Pennsylvania*, 458 U.S. 375, 391 (1982). However, in addition to a showing of intent, under the three stage method of proof established in *McDonnell-Douglas*, once the employer has shown that its decision was based on a "legitimate non-discriminatory reason," *Burdine*, 450 U.S. at 254, the "factual inquiry proceeds to a

new level of specificity." *Burdine*, 450 U.S. at 255. Where, as in this case, the employer has proffered superior qualifications as the non-discriminatory reason for its employment decision, Petitioner's burden is to demonstrate "pretext." Petitioner's burden is to show that the "proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. Petitioner states that "there are at least three ways through which the Petitioner can meet her burden of discrediting the proffered explanation" other than proof of her superior qualifications: (1) by showing her qualifications are equal; (2) by showing that the employer did not rely on qualifications in making its decision; and (3) by showing that the reason given by the employer is not credible.[40]

Assuming *arguendo* that Petitioner's analysis is correct, it is logical that where a Plaintiff has *not* shown that her qualifications are equal or, has *not* shown that the employer did not rely on qualifications or has *not* shown that the employer's proferred reason lacks credibility, then the only alternative remaining way to show pretext is that of superior qualifications. Petitioner offered no evidence in rebuttal to the simple non-discriminatory explanation for the advancement of Mrs. Williamson to Account Intermediate. Therefore, where the Petitioner has offered no legally sufficient evidence to sustain a finding of one of the "other ways" to show pretext, the court was correct in instructing the jury that she must show superior qualifications in order to establish pretext. Even under Petitioner's own analysis this was a proper instruction.

The Petitioner implies that the district court judge instructed the jury that the Plaintiff must show that she was better qualified than the person who received the promotion in order to make a *prima facie* case.[41] In fact, the trial judge outside the hearing of the jury, stated to counsel that "the law in the Fourth Circuit seems to be that

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[40]Brief for Petitioner at p. 82.

[41]Brief for Petitioner at pp. 88-91.

in order to make out a *prima facie* case, you must show that you are better qualified than the person who received the promotion."[42]

Although Petitioner has seized on this statement by the court as an apparent misstatement of the law, such comments by the court are not pertinent because they were made outside the hearing of the jury and because once such a case has been fully tried on the merits, the question of whether the plaintiff has established a *prima facie* case is no longer relevant. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-715 (1983); *Mitchell v. Baldridge*, 759 F.2d 80 (D.C.Cir. 1985).

Respondent contends that Petitioner need establish only that she was qualified, not that she was more qualified than Mrs. Williamson, in addition to the other elements necessary, to prove her *prima facie* case. However, under the facts of this case, Petitioner must show superior qualifications after a showing by the employer that qualifications were the basis for its decision.

With regard to Petitioner's claim of promotion discrimination, she has offered no competent evidence of unlawful criteria legally sufficient to rebut the proffered explanation that Mrs. Williamson received a title advancement based upon her qualifications and performance.

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[42]TR 5-29 to 5-31

CONCLUSION

For the reasons stated, the decision of the Fourth Circuit Court of Appeals should be affirmed as to all issues.

Respectfully submitted,
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